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No. 09-1027

MAY 24 2010

In The Supreme Court of the United States

CITY OF NEW ALBANY, INDIANA,
Petitioner,

v.

NEW ALBANY DVD, LLC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's brief in opposition wholly fails to refute, and thus concedes, the extensive split in the circuits that has been percolating in the lower courts over *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), a "fractured decision" that "dozens of appellate decisions . . . have struggled to understand and apply" without producing "any concrete legal rule." (App. 44a) (Easterbrook, C.J.). Instead of addressing the question presented—a question of "utmost importance" to *amicus* International Municipal Lawyers Association and cities and counties nationwide—respondent quibbles about procedure and facts irrelevant to that question. For the (unrefuted) reasons stated in the petition, this Court should issue a writ of certiorari to review the decision below.

1. Respondent's statement about the procedural posture of the case is unavailing. First, respondent does not deny that the entirety of the City's secondary effects evidence—including land use and crime impact reports, judicial decisions, eyewitness observations of adverse impacts, and the testimony of the City's expert witness—is in the record and was evaluated by the lower courts. Respondent, whose counter-evidence is also in the record, is thus tellingly silent about *what* discovery would be taken that is relevant to the question presented. There is none. At bottom, respondent's argument assumes its own conclusion: that the City should have to begin the case anew to conduct an empirical, after-the-fact local study that the Seventh Circuit—in direct contravention of this Court's precedents—requires.

Second, respondent does not dispute that this Court often reviews First Amendment cases on preliminary injunction. Indeed, the only case that respondent cites on this issue, *McCreary County v. ACLU*, 545 U.S. 844, 867 (2005), is consistent with the cases cited in the petition (at 29-30) in that the Court granted certiorari to review a First-Amendment based preliminary injunction.

2. As to the facts, respondent's roving statement—which is unsupported by *any* citations to the record—is: (a) irrelevant to the question presented, (b) includes material outside the record, and (c) is rife with inaccuracies.

a. Respondent's factual statement begins with an attempt to impugn the City's motives (Brf. Opp. 4-13) based on how various individuals—including citizens who are not City officials or employees—reacted when they learned that DVD had lied to the City about the kind of business it was establishing next to a home and across the street from a church. (R. 19, Wood Aff. at 1) (tile shop misrepresentation).

DVD's discussion is irrelevant for two reasons. First, it is irrelevant to the question presented, which asks whether the Seventh Circuit's new legal standard for secondary effects evidence contravenes this Court's precedents. Second, DVD's amended complaint challenging Ordinance G-04-10 did not claim that strict scrutiny applied or that the Ordinance banned or restricted speech because of objection to content. (R. 39.) Instead, DVD claimed that the City's secondary effects evidence was insufficient to satisfy intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968). (R. 39, ¶ 29.) Moreover, under

O'Brien, "'this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'" *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (quoting *O'Brien*, 391 U.S. at 383-84).

The factual statement continues (Brf. Opp. 13-20) with commentary about the extensive secondary effects evidence, including competing expert witness testimony, presented to the district court—which concluded that the City *met* its burden under the "reasonably believed to be relevant" standard established in *Renton* and reaffirmed in *Alameda Books*. (App. 23a-24a.) Respondent's discussion, which goes to the merits of the question presented by the Seventh Circuit's departure from that standard, actually highlights elements of the circuit split shown in the petition and demonstrates that this case's full evidentiary record on secondary effects makes it an ideal vehicle for resolving the question presented.

b. Attempting to litigate the Seventh Circuit's new standard in this Court, respondent resorts to arguing evidence completely outside of the record. (Brf. Opp. 21-22) (alleging facts occurring after entry of the injunction and after oral argument in the Seventh Circuit). This is wholly inappropriate. *Russell v. Southard*, 53 U.S. 139, 159 (1851); *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970). Moreover, this inappropriate argument simply underscores—again—the centrality of the question presented, which concerns whether a city must present empirical, localized proof that it has already suffered secondary effects in order to justify a *Renton*-type regulation designed to prevent them.

c. The inaccuracies in respondent's factual statements about early events in the case and the evidence presented at the second evidentiary hearing, though irrelevant to the question presented, are sufficiently egregious to warrant a response.

First, respondent attempts to obscure the fact that its adult bookstore is adjacent to a home and across the street from a church by describing the street it is on as "lead[ing] to a local gambling casino." (Brf. Opp. 3.) The casino is five to eight miles away. (R. 116, Tr. 101:20-24.)

Second, respondent parrots the Seventh Circuit's statement that respondent "secured all necessary licenses" prior to February 19, 2004. In fact, the district court found that DVD did not apply for an improvement location permit (ILP) prior to February 19, 2004, but did so only after the first evidentiary hearing. (App. 30a.) The initial application was denied based on safety issues (*e.g.*, a pole sign in the middle of the driveway providing ingress/egress from and to Main Street) and based on the location restrictions in the Ordinance. (R. 61, Ex. B.) After the site plan was amended to resolve the miscellaneous safety issues, the ILP was denied solely based on the location restrictions. (App. 30a.) Thus, the parties agree that the Ordinance is the only impediment to DVD's lawful operation at its present location. Moreover, as the Seventh Circuit observed, whether DVD opened lawfully "has no continuing import." (App. 3a.)

Similar observations refute respondent's challenge to the term "unsafe building" in the Notice-Order that the building commissioner applied to respondent's site on February 19, 2004. The term properly applies to a

building that is being used but has not been inspected for safety and thus lacks a certificate of occupancy. (R. 74, Tr. 79:6-8, 80:18-20.) Moreover, as noted above, the site was in fact unsafe for various reasons, including the dangerous location of the pole sign. (App. 15a; R. 61, Ex. B.)

Third, respondent cites its own counsel's statements to claim that the letter setting an administrative hearing on the February 19, 2004 Notice-Order was a "ruse" because the "hearing was never held" on March 9, 2004. Yet, respondent's counsel initiated cancellation of the hearing *by agreement* on the ground that he had already filed suit concerning the same issue to be addressed in the hearing. (R. 19, Exh. A, ¶¶ 8-11.)

Fourth, respondent's irrelevant factual statement attempts to impugn the motives of the City by quoting—without citation—various individuals who spoke during public meetings. But respondent erroneously attributes to the mayor a block quote of comments that were actually voiced by a citizen. (*Compare* Brf. Opp. at 9-10 *with* R. 21, Exh. A, Feb. 19, 2004 Transcript at Sheet 6 (comments of Betty Walters).) Additionally, DVD quotes several statements from certain citizens on an *ad hoc* advisory committee who are neither elected officials nor City employees and who did not participate in drafting Ordinance G-04-10. (*See, e.g.*, Brf. Opp. 10-11.)

Respondent's discussion of select portions of the second evidentiary hearing is misleading on multiple fronts, but ultimately highlights the deep circuit split detailed in the petition.

First, respondent argues that the City "did not rely upon any study that *exclusively* dealt with 'retail' establishments such as DVD." (Brf. Opp. 14.) Of course, this argument begs the question of whether legislative evidence must be specific to a plaintiff's self-defined subcategory of sexually oriented business. (*See* Pet. 17-22) (describing circuit split on this issue).

Moreover, the City did present evidence of secondary effects from retail-only adult bookstores. (*See* Pet. 4-5.) Claiming that the Garden Grove study has "nothing indicating it is *devoted* to retail establishments" (Brf. Opp. 18), respondent attempts to convey the impression that the study did not address retail-only adult bookstores at all. However, the study did include such establishments. (R. 76, Exh. D at 4-5.) Likewise, the Greensboro study relied upon by the City included retail-only adult bookstores. (R. 89, Exh. C at 37; *see also* R. 75 at 11-13 (citing city's reliance upon the secondary effects evidence from retail-only adult bookstores found sufficient in *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004).) This is in addition to studies documenting the adverse effects of "adult bookstores" which the City reasonably concluded includes adult bookstores like respondent. (*See, e g.*, R. 76, Exhs. C-1, C-3, C-4.)

Second, respondent attempts to redefine the City's regulatory rationale (Brf. Opp. 14), but the district court correctly explained what is undisputed: that the Ordinance's purpose is to prevent secondary effects. (App. 23a.) Respondent, in fact, concedes that the City "was *not* advancing the notion that viewing adult materials causes adverse secondary effects." (Brf. Opp. 17-18); *cf. Boos v. Barry*, 485 U.S. 312, 320-21 (1988)

(explaining the difference between primary and secondary effects).

Third, respondent's discussion ignores the wide variety of secondary effects, including adverse impacts on property values, that the Ordinance targets (App. 52a) and instead addresses only crime, repeating its previous mischaracterization of the criminological theory articulated by the City's rebuttal expert. (*Compare* Brf. Opp. 14 *with* Pet. 10) (discussing routine activities theory).

Respondent's argument concerning the City's interest in preventing crime is without merit. Recognizing that New Albany had no sexually oriented businesses when respondent sought to open, respondent cites calls-for-service (CFS) to the police to *non*-sexually oriented businesses in New Albany to show that the City had no basis for regulating sexually oriented businesses. (App. 22a) (noting DVD presented evidence on establishments that sell some adult material in back rooms, but "are *not* regulated by the Ordinance" because they fall below the threshold of sexually explicit material necessary to be qualified as an adult bookstore) (emphasis added). Respondent's argument is plainly irrelevant to whether the City relied on some evidence "reasonably believed to be relevant" to its interest in regulating avowedly sexually oriented businesses like respondent.

Moreover, to the extent that respondent seeks to analogize its 100% adult bookstore to *non*-sexually oriented businesses with adult material behind blinder racks next to cigarettes (*i.e.*, a convenience store) or in a back room (*i.e.*, a neighborhood video store), it

highlights the comparative-analysis issue in the split among the circuits. (Pet. 22-28.)

The Seventh Circuit embraced the *non sequitur* raised by sexually oriented businesses in every secondary effects case, namely that if a given *non*-adult business has greater secondary effects than an adult business, there is no substantial government interest in regulating to prevent the adverse impacts of the adult business. (App. 38a) (holding that 41 arrests for public masturbation at adult bookstore during one-year period do not establish a substantial government interest without a showing that these adverse effects are greater than those at non-adult businesses). *But see, e.g., Flanigan's Enters., Inc. v. Fulton County*, 596 F.3d 1265, 1281 (11th Cir. 2010) (holding that county established substantial government interest in preventing the secondary effects identified at adult businesses "[e]ven if we were to accept that crime is greater in and around the non-adult establishments").

Indeed, respondent's reliance on Dr. Linz's analysis of local CFS data only emphasizes the deep circuit split on the evidence necessary to satisfy the *Renton-Alameda Books* standard. For example, Judge Easterbrook's opinions below (in *Annex Books* and in this case) credit Dr. Linz's testimony in holding that the cities have not compiled sufficient evidence to satisfy that standard. (App. 7a) (alluding to evidence from Dr. Linz "implying that take-home adult stores do not have adverse secondary effects"); (App. 41a) (crediting Dr. Linz's testimony in reversing summary judgment for Indianapolis). But other circuit courts have reached the opposite conclusion. *See, e.g., Doctor John's v. Wahlen*, 542 F.3d 787, 792 (10th Cir. 2008)

(affirming summary judgment on regulation of retail-only adult bookstore and "[I]n light of the Supreme Court's rejection [in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 300 (2000)] of this specific analysis by Dr. Linz, we see little need to continue."); *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 883 n.3 (11th Cir. 2007) ("Interestingly, Daniel Linz, one of the experts hired by Lollipop's, also co-authored the studies found to be insufficient in two of these cases. *See G.M. Enters., Inc.* [*v. Town of St. Joseph*], 350 F.3d [631] at 635-36, 639 [(7th Cir. 2003)]; *SOB, Inc.* [*v. County of Benton*], 317 F.3d [856] at 863 [(8th Cir. 2003)].").

Similarly, the plaintiffs' evidence in both this case and in *Annex Books* consisted of police calls-for-service (CFS) data. (App. 22a, n.13); *Annex Books, Inc. v. City of Indianapolis*, 333 F. Supp. 2d 773, 786 (S.D. Ind. 2004) (noting that Dr. Linz analyzed police call data), *rev'd in relevant part*, 581 F.3d 460 (7th Cir. 2009) (App. 33a *et seq.*). While Judge Easterbrook's opinions credited this kind of data, other circuits have rejected it as insufficient to undermine municipalities' interest in regulating sexually oriented businesses. *See, e.g.*, *Daytona Grand*, 490 F.3d at 882 & n.31 (discussing survey of leading criminology journals which found that none of the 245 recent articles measuring crime or crime risk used CFS for that purpose).

Fourth, respondent's challenges to Dr. McCleary's testimony (rebutting Dr. Linz) are without merit. For example, Dr. McCleary's entire testimony makes it clear that the City has a valid public safety concern over DVD's proximity to the church across the street any time that people are on the premises. (R. 116, Tr. 167:21-25) (clarifying that his statement concerning

churches is based on the "idea of church worship on Sunday morning, which I assume is a very slow business time for sexually-oriented businesses. *For that reason* the public safety is not relevant. *But when you get into use of the church facility at other periods of time, then public safety issues become relevant*") (emphasis added).

Similarly, respondent mischaracterizes Dr. McCleary's testimony by suggesting that "local criminals" are the City's central concern. Dr. McCleary never referred to "local" criminals, but rather testified that adult businesses of all types, including retail-only adult bookstores, attract both potential victims and predatory criminals from a wide area, *e.g.*, outside the neighborhood. (R. 116, Tr. 168:107.)

Finally, respondent's reference to the 30% threshold for the adult bookstore classification is likewise a red herring. DVD is not a mainstream bookstore seeking to avoid regulation, but is an undisputed adult bookstore whose sole *raison d'etre* is the sale of sexually explicit fare. Indeed, ordinances commonly apply such thresholds (R. 116, Tr. 168:14-169:13), and thereby avoid vagueness claims frequently raised against less precise definitions. *See, e.g., Wisconsin Vendors, Inc. v. Lake County*, 152 F. Supp. 2d 1987 (N.D. Ill. 2001).

3. Respondent's discussion of *Alameda Books* is equally unavailing because it neither denies the existence of the circuit split compelling this Court's review nor shows that the Seventh Circuit's decision is correct under that case.

Contrary to respondent's suggestion, *Alameda Books* does not require municipalities to affirmatively prove causation of secondary effects. Rather, *Alameda Books* reaffirmed *Renton's* central holding "that a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." 535 U.S. at 438 (plurality opinion); *id.* at 535 at 451 (Kennedy, J., concurring in judgment). Similarly, *Alameda Books* refused to require municipalities to "bear the burden of providing evidence that rules out" alternate explanations of secondary effects. *Id.* at 437 (plurality opinion).

Nor does *Alameda Books* require evidence that adult establishments produce a greater amount of crime than non-adult establishments. First, the language that respondent quotes comes from the plurality's description of the Ninth Circuit's decision, not from a prescriptive rule of law. 535 U.S. at 436. Nothing in the plurality opinion suggests that sexually oriented businesses must be proven to have the *most* crime problems in a municipality in order for the municipality to justify regulations designed to prevent such businesses' secondary effects. Yet, as noted in the petition, a circuit split has developed over this issue and requires resolution by this Court. (Pet. 22-28.)

Finally, respondent's closing reminder that the remand order gives the City a "second bite at the apple" is an implicit concession that the Seventh Circuit created a new legal standard, because the district court *already conducted a full evidentiary hearing* under the "reasonably believed to be relevant" standard established in *Renton* and reaffirmed in

Alameda Books. After the evidentiary hearing, the district court concluded:

> The City has established through this evidence the first prong of the *Renton* test for the following reasons. First, the Ordinance states that its purpose is to prevent a wide variety of harms that sociological and criminological studies tend to demonstrate are associated with sexually oriented businesses. . . . Second, the studies relied upon by the City in enacting the Ordinance are relevant to the problem of regulating secondary effects, such as crime. . . . Under the *Alameda Books* test, DVD neither demonstrates that the City's evidence does not support its rationale nor does it dispute the factual findings of the many studies relied upon by the City.

(App. 23a-24a.)

Conspicuously absent from the Seventh Circuit's decision below—as well as from the *Annex Books* decision on which it relies *and* respondent's brief in opposition—is any mention of this Court's "reasonably believed to be relevant" standard. Because the decision below jettisoned that standard in favor of much more rigorous requirements for secondary effects ordinances, this Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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